Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAW Communications, Inc., *Complainant*, v. PPL Electric Utilities Corporation, *Defendant*.	Proceeding Number 19-29 Bureau ID Number EB-19-MD-001

REPLY BRIEF IN SUPPORT OF AMENDED POLE ATTACHMENT COMPLAINT

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SUMMARY

PPL does not dispute the essential facts supporting MAW's denial of access claims. In fact, PPL concedes that since April of last year, it has removed over 100 of MAW's attachments, denied MAW access to restore outages to its attached facilities, required MAW to resubmit its applications in numerous formats to conform to PPL's changing application requirements, and then sat on MAW's pending applications for over seven months.

PPL now asserts that it will not process MAW's applications unless and until MAW agrees to PPL's euphemistically labelled "holistic approach" and removes its entire network, regardless of whether MAW's attachments are NESC compliant, or occupy the same pole location long occupied by the City's and the Lancaster City Safety Coalition's ("LCSC") facilities. While PPL also claims it has not processed the applications because MAW did not replenish the court-ordered escrow ostensibly needed to pay for make-ready work, in fact, to date PPL has not used the funds to make the poles ready for MAW's attachments, but rather to remove them. Neither rationale for PPL's denial holds water, let alone comports with the limited permissible reasons for denying access set forth in Section 224(f)(2) and the Commission's rules and orders.

As shown by PPL's Answer and exhibits, there are no genuine safety issues or generally applicable engineering reasons justifying removal of MAW's entire network. A close look at PPL's Attachment D, Exhibit 4, which claims that 1,095 poles have unauthorized MAW attachments, reveals that, among other things:

- A third of the poles in Exhibit 4 are actually authorized. In fact, according to PPL, MAW has been paying annual rent to PPL for 426 attachments in the City of Lancaster since 2016, and 241 of them are present in Exhibit 4.

- Less than half (42%) of the poles in the Exhibit 4 are alleged to have safety violations.
- Approximately 71% of the alleged violations related to ungrounded streetlights, and approximately half of those fall under the 2012 grandfathering rule.
- At least 502 of the 586 alleged violations pertain to MAW's ADSS service drops, which can be closer than 40 inches to power facilities, or the J-and-raise, which was always meant to be temporary.
- The vast majority of the remaining violations were caused by through bolts installed by the City or LCSC long before MAW agreed to rebuild the municipal network.
- PPL either knew or should have known about the City's unauthorized attachments and related safety violations well before 2018, particularly given PPL's 2009 audit of the City's attachments, suggesting that PPL allowed known safety violations to exist since that time and raising questions concerning PPL's relationship with the City.

PPL also refuses to reconsider its unreasonable position, resulting in an effective denial of access, that new attaching entities must attach above the highest existing communications attachment on the pole even where other space exists, resulting in extraordinarily high, unnecessary make-ready costs. This is a position, which, if upheld, will undermine the objectives of the FCC's new OTMR rules. Attaching directly above or below the lowest attacher on the pole—almost always the ILEC—when there is room to do so, is the easiest, least costly, and most achievable deployment solution for all new attachers.

Many of the other allegations raised by PPL in its Answer are simply not relevant to PPL's ongoing denial of access. While MAW would prefer to avoid a tit for tat exchange, it addresses those allegations herein to the extent necessary to rehabilitate MAW's reputation, and

that of its principal Mr. Frank Wiczkowski, and its Director of Information and Communications Technology, Mr. Eron Lloyd. Moreover, while PPL's Answer casts numerous aspersions about MAW and Messrs. Wiczkowski and Lloyd, PPL fails to mention its separate ongoing business relationship with MAW consisting of two IRU agreements related to PPL's Reading Metro Ring Network, or that PPL stands to gain by driving MAW out of business. Moreover, based in part upon the documents identified by PPL in response to MAW's interrogatories, MAW has reason to believe that PPL has entered into an agreement with the City concerning its significant number of pre-existing unauthorized attachments while simultaneously punishing MAW for using those same attachments.

MAW has repeatedly tried to resolve this dispute on terms that do not involve the needless destruction of its entire plant in Lancaster, to no avail. MAW has attempted to comply with PPL's shifting demands in good faith. MAW seeks FCC intervention to ensure MAW's applications are timely processed in accordance with the Commission's rules.

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REPLY

MAW Communications, Inc. ("MAW") respectfully submits this Reply to PPL Electric Utilities Corporation's ("PPL" or "Pole Owner") Answer in the above-captioned Complaint pursuant to Subpart J of the Federal Communications Commission ("FCC" or "Commission") Rules, 47 C.F.R. §§ 1.1401 *et seq.* for an ongoing denial of access to PPL's poles.

I. INTRODUCTION

To construct its network in Lancaster, MAW must access PPL poles.[1] In its Answer, PPL goes to great lengths to paint MAW as a bad actor, raising wholly unrelated matters in an attempt

[1] Compl. ¶ 16. Contrary to PPL's suggestion in its response, underground construction is not a viable alternative to aerial construction. "[I]n most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables." *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). In enacting the federal pole attachment Act, Congress explained, "owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often ***no practical alternative*** to a CATV system operator ***except to utilize available space on existing poles***." S. REP. NO. 580, 95th Cong. 1st Sess. 13 (1977) (emphasis added); *see also* 123 Cong. Rec. H35008 (1977) (statement of Rep. Broyhill, co-sponsor of Pole Attachment Act) ("The cable television industry has traditionally relied on telephone and power

to cloud the issues raised by MAW's Complaint. At its core, however, MAW's Complaint alleged a denial of access. Specifically, MAW requests the FCC to order PPL to comply with its mandatory access obligations under Section 224(f), by:

- processing MAW's pending pole attachment applications, which were submitted over seven months ago pursuant to the Court's instructions purporting to resolve the parties' dispute concerning MAW's alleged unauthorized attachments, and which PPL concedes were filed in accordance with its application requirements but still have not been processed, in flagrant disregard of the Commission's application timeframes;

- granting MAW access to work on its existing facilities attached to PPL poles to perform routine maintenance and address service outages, which PPL concedes it refused allow in response to four out of six requests over the last year;

- ceasing removal of MAW's attachments and instead working with MAW to remediate any safety violations that exist on the poles to which MAW is attached regardless of whether MAW or another entity, including the City, LCSC, or PPL, created the violation; and

- allowing attachments to be made using all available communications space on the pole rather than solely above the highest attachment (*i.e.*, the highest available attachment point), consistent with the FCC's objectives in adopting its one touch make-ready ("OTMR") rules, to lower the cost of and accelerate the attachment process.

To the extent that MAW raised other facts in the Complaint it did so to be transparent and to provide appropriate background given the complicated history of this dispute. The parties obviously dispute whether there was proper authorization for certain attachments, but the remedy devised by the Lehigh County Court involved filing corrective applications for all of MAW's Lancaster plant,[2] which it did in August 2018, nearly seven months ago—and yet PPL still refuses to process these applications. In the meantime, PPL's actions have actually and

companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . ."). The fact that MAW has previously used underground construction methods to deliver service in certain isolated areas of the City does not mean it is a viable solution for deployment of a citywide network.

[2] *See* April 2018 Order, MAW 000138-000142.

effectively denied MAW access to PPL's poles in violation of federal law and the Commission's rules[3] and have prevented MAW from delivering vital service to its customers.

II. PPL ADMITS THAT IT IS DENYING MAW ACCESS TO PPL POLES AND OFFERS NO PERMISSIBLE REASONS FOR REFUSING TO PROCESS MAW'S APPLICATIONS

A. PPL Admits That It Is Denying MAW Access To Its Poles

In its Answer, PPL admits that it has removed MAW's attachments, that it refuses to process MAW's applications that were filed in accordance with PPL's application requirements and the Lehigh County Court's April 2018 Order, and that it has not granted the majority of MAW's requests to access MAW's facilities to restore service outages. PPL confirms that it is "currently not granting any of MAW's new attachment applications . . ."[4] PPL claims that it has "timely reviewed" MAW's applications but has not approved them for "many reasons," and further states that it "will not process MAW's applications if MAW insists on keeping its facilities in place."[5] PPL admits that MAW has 76 applications that are "Pending Admin Review" and 48 applications "In Review"—the latest of which were submitted August 2, 2018, over seven months ago—but that PPL has not acted on such applications and evidently has no plans to do so.[6] PPL claims that it marked one of MAW's August 2018 resubmitted applications

[3] At the outset, PPL questions whether MAW has any federal pole attachment rights. Answer at 1 & n.1. PPL's only support for this statement is MAW's consumer-facing website that describes MAW's provision of broadband services. *Id.* Such a description is not dispositive as to the regulatory status of MAW's service for the purpose of Section 224. The Commission recently warned pole owners against using classification of services as a barrier to access, cautioning pole owners "not to use this *Order* as a pretext to increase pole attachment rates or to inhibit broadband providers from attaching equipment—and we remind pole owners of their continuing obligation to offer 'rates, terms, and conditions [that] are just and reasonable.'" *In re Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, 33 FCC Rcd. 311, 424 ¶ 186 (rel. Jan. 4, 2018).
[4] Answer at 51.
[5] *Id.* at 65.
[6] *Id.* at 70.

as "Incomplete" "because the application is not part of a holistic solution that includes the removal of unauthorized attachments while new applications are being processed."[7]

Furthermore, with the court-ordered prohibition in place preventing MAW from even servicing its own existing attachments, MAW must obtain PPL's permission anytime it needs to access its own facilities,[8] which it has done several times.[9] Of MAW's **six** requests for emergency repair and service restoration, PPL has only approved **two** as requested, approving one in part, denying another, and leaving two requests mysteriously "under review."[10]

PPL has clearly and repeatedly admitted that it is not processing MAW's applications, unlawfully denying MAW access to its facilities with no permissible reason.

B. PPL's Reasons for Denying MAW Access Are Not Permissible Under Federal Law

In its Answer, PPL alleges several safety violations regarding MAW's attachments. However, PPL stops short of explicitly making those safety allegations the basis for PPL's refusal to process MAW's applications. Under Section 224(f)(2), a pole owner may only legitimately deny access to its facilities on a nondiscriminatory basis for insufficient capacity and reasons of legitimate safety, reliability, and generally applicable engineering standards.[11] None of the various stated reasons that PPL offers in its Answer for refusing to act on MAW's requests

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[7] *Id.* at 73. PPL's numerous exhibits include meeting minutes that show how much effort has been spent to date on this project. *See, e.g.*, PPL000030-000031, PPL000035-000038, PPL000202-000206, PPL000212-000214, PPL000216-000218. It would be wasteful to allow PPL to simply remove all of MAW's plant, particularly when it has not presented any evidence that MAW built a bad network. FW Reply Decl. ¶ 4 and Exh. 1. MAW's rebuilt single mode network promises to deliver high quality services to Lancaster residents. *See id.*, Compl. ¶¶ 18-21.

[8] *See* April 2018 Order, MAW000139.

[9] Answer at 65.

[10] *Id.*

[11] *See* 47 U.S.C. § 224(f)(2).

and applications, however, meet these statutory criteria.[12] Primarily, PPL claims that it will not act on MAW's applications because MAW has not restored an escrow fund set up by the Lehigh County Court's April 2018 Order, ostensibly to cover "make-ready" work but in reality to fund PPL's removal efforts.[13] PPL does not make its safety claims a basis for its denial because it cannot lawfully do so under Section 224(f)(2). As MAW explains in detail below (1) many of the safety issues predated MAW's involvement in Lancaster and were known or should have been known to PPL for over a decade, (2) other safety issues regarding PPL's ungrounded streetlights are either properly grandfathered or easily correctable, (3) alleged safety violations related to MAW's service drops are unfounded given the non-conductive properties of those attachments; and (4) PPL's own data indicates that the problem is nowhere near as exigent or widespread as PPL claims.

1. The Majority of Alleged Safety Violations Identified by PPL Long Predate MAW's Attachments Yet Remain To This Day

While PPL does not explicitly raise safety as a basis for stalling on MAW's applications, PPL makes several safety-related claims in reference to MAW's facilities that MAW wishes to address. At the outset, less than half of the alleged unauthorized attachments included on Attachment D, Exhibit 4 are listed as having safety violations.[14] Moreover, many of the safety issues that PPL alleges relate to the manner in which the facilities were installed, which was taken into account by the Lehigh County judge in the issuance of his Order, but are not continuing safety violations.[15]

[12] Answer at 65 (listing reasons for not approving MAW's applications that are essentially paperwork issues).
[13] *Id.* at 51.
[14] PPL Attachment D, Exh. 4, PPL000042-000064.
[15] FW Reply Decl. ¶ 5.

Importantly, many of the alleged safety-related violations that PPL alleges have been in existence for nearly a decade, predating MAW's involvement in Lancaster, and were in fact caused by either the City or LCSC, and in the case of the City, when it attached without permission. In 2009, PPL conducted a partial audit of the City's attachments to PPL poles, finding 447 unauthorized attachments, including 276 attachments with NESC clearance violations or damaged/missing equipment ("2009 Audit").[16] A comparison of this 2009 Audit to the 2018 Katapult survey reveals that the City and PPL have been aware of numerous violations for almost ten years, yet the violations still exist today.[17] Moreover, MAW offered to PPL all of the data from its own 2015 survey of PPL's poles in Lancaster, which take the form of pole profile sheets long accepted by PPL, on numerous occasions because MAW uncovered many of these unauthorized attachments and preexisting noncompliance during its own pre-construction surveys related to upgrading the municipal network, yet PPL repeatedly refused to accept this information from MAW.[18]

[16] *Id.* ¶ 6 and Exh. 2 (2009 PPL Audit of City Attachments). The survey began June 18, 2009, was completed by September 17, 2009, and the results transmitted to the City by October 2, 2009. *Id.* MAW acknowledges that PPL's 2009 audit was not previously raised in this proceeding; however, citation to the 2009 audit is necessary to respond to allegations and data points raised by PPL in its Answer. Moreover, the audit is not prejudicial to PPL because it is a document produced in-house by PPL, and because PPL admitted in its Answer that 534 City/LCSC attachments were unauthorized. Answer at 34.

[17] FW Reply Decl. ¶ 7.

[18] *Id.* ¶ 8. MAW is enclosing its pole profile sheets that documented the City's preexisting noncompliance with this Reply. *See id.* at Exh. 3. Pole profile sheets are enclosed; additional photographs and videos are available upon request. *Id.* Despite repeatedly rejecting this data, PPL was served with this information in conjunction with the Lehigh County litigation, and thus it should cause no harm. Regrettably, PPL's conduct in refusing to accept MAW's 2015 survey is consistent with its refusal to accept other attacher surveys and pole profile sheets, and is one topic in a similar FCC complaint filed by Zito Media. *See Zito Canton, LLC v. PPL Electric Utilities Corp.*, Proceeding No. 17-284, File No. EB-17-MD-005 ("*Zito Canton Complaint*").

Indeed, many of the violations that PPL reported to the City in October 2009 are the same as those in the 2018 Katapult survey. For example, three poles that appear in PPL's 2009 Audit as violations, Grid #40461S25566 ("Close to street light"),[19] Grid #40471S25567 ("Close to street light"),[20] and Grid #40510S25890 ("Close to secondary"),[21] appear in the Katapult survey with nearly identical violations listed. Moreover, PPL grossly mischaracterizes several of the attachments in the Katapult survey as "new unauthorized MAW build" when they are in fact (1) listed as City attachments in the 2009 audit and (2) have the same exact violations listed. For example, Grid #40540S26094 is listed as "New Unauthorized MAW Build" that is 23 inches from an ungrounded street light—but the same Grid number is listed as a City violation in the 2009 Audit ("Close to street light"), and in any event was installed prior to the effective date of the 2017 edition of NESC, grandfathering it under the then-existing 20-inch clearance standard.[22] Another pole, Grid #40542S26088, is also listed as "New Unauthorized MAW Build" 24 inches from a secondary riser, when it too appears as a City violation in the 2009 Audit with the same violation ("Close to top of UG riser").[23] PPL's 2009 Audit also notes that several of the City's attachments had "Crisscross of facilities" violations, a complaint similar to the "weaving" allegation that PPL now lodges against MAW.[24]

The noncompliance documented in MAW's 2015 survey lines up with many of the violations recorded in PPL's 2009 Audit of the City's poles—meaning PPL knew about these alleged "exigent" safety issues, did nothing to correct them, and now seeks to blame MAW for

[19] *Compare* PPL000058, *with* MAW000738.
[20] *Compare* PPL000058, *with* MAW000738.
[21] *Compare* PPL000062, *with* MAW000738.
[22] *Compare* PPL000043, *with* MAW000738.
[23] *Compare* PPL000043, *with* MAW000738.
[24] Answer at 18. This makes sense given that MAW used the existing City and LCSC attachments for the bulk of its attachments.

all of the problems.[25] It is outrageous that PPL refused to accept MAW's 2015 survey data and forced MAW to pay Katapult $44,930.18 for a new survey in 2018 only to reveal that a substantial portion of the violations alleged in the 2018 survey ***were already surveyed and documented by PPL nearly ten years earlier, yet never remedied***. Forcing MAW to pay for a duplicative survey that MAW had already undertaken, only to document the same exact preexisting violations, is contrary to well-established FCC precedent.[26] Uncorrected, decades-long violations may also be unlawful under state regulations, based on PPL's independent obligation to inspect its poles periodically pursuant to regulations adopted by the Pennsylvania Public Utility Commission ("PA PUC").[27] PPL either knew, or should have known, of these preexisting violations and unauthorized attachments, itself acknowledging in its Answer that outside of MAW's 428 authorized attachments transferred from LCSC, the City/LCSC failed to obtain authorization for 539 attachments.[28]

In an apparent attempt to foist responsibility for this preexisting noncompliance upon MAW, PPL and the municipal stakeholders seek to have it both ways—claiming at the same time that the City/LCSC never intended to transfer more than the 428 attachments initially transferred to MAW and instead maintaining the municipal ownership of the rest of the

[25] FW Reply Decl. ¶ 9.
[26] *See also Newport News Cablevision, Ltd. Commc'ns, Inc. v. Virginia Elec. and Power Co.*, 7 FCC Rcd. 28610 8 (1992) (holding that a survey designed to benefit other pole users should not be paid for by one company); *Mile Hi Cable Partners, L.P. v. Pub. Serv. Co. of Colo.*, 15 FCC Rcd 11450, 11455-56 (Cable Serv. Bur. 2001); *Tex. Cable & Telecomm. Ass'n v. Entergy Servs., Inc.*, 14 FCC Rcd. 9138 (Cable Serv. Bur. 1999).
[27] *Revision of 52 Pa. Code Chapter 57 Pertaining to Adding Inspection, Maintenance, Repair, and Replacement Standards for Electric Distribution Companies*, Pa. Pub. Util. Comm'n, Final Rulemaking Order, Docket No. L-00040167 (May 22, 2008) (codified at 52 Pa. Code § 57.198(n)(2)).
[28] Answer at 34 ("The remaining 534 municipal network attachments were attached to PPL's poles without authorization.").

attachments. First, regarding PPL's claims that the City did not intend to transfer its municipal attachments, the parties' Municipal Carrier Agreement states otherwise.[29] However, to the extent the City and LCSC wish to retain the remainder of their unauthorized and/or noncompliant attachments that PPL refuses to have transferred to MAW, the municipal stakeholders similarly remain responsible for paying rent on those attachments and paying to remediate any noncompliance or violations. Based on circumstantial evidence produced by PPL, it appears that PPL entered into an agreement with the City and LCSC concerning the significant number of pre-existing unauthorized attachments while simultaneously punishing MAW for using those same attachments around the same time it began removing MAW's attachments.[30] While PPL has not disclosed the nature of that agreement, MAW has included interrogatories along with this Reply relating to such agreements.

2. Many of the Alleged Safety "Violations" Involve Either Properly Grandfathered or Easily Correctable Streetlight Separation Issues

PPL's Attachment D, Exhibit 4 identifies a total of 586 alleged violations in the following categories:

>20" from Streetlight
<20" from Streetlight
<40" from Drip Loop (streetlight & power)
<40" from Secondary/power cable

[29] *See* Municipal Carrier Agreement, MAW000024-MAW000045.

[30] FW Reply Decl. ¶ 10. In discovery, PPL produced document titles that indicate PPL may have entered into a private agreement with the City and LCSC at some point in 2018. *See id*. at Exh. 4 (PPL Discovery Response: "Ryan J. Yanek Documents 2," line 218 ("Lancaster County – City of Lancaster Agreement.pdf," Mar. 19, 2018), line 231 ("Private Agreement – Lancaster City-Lancaster Community Safety Coalition (3316).pdf," Mar. 19, 2018)). Notably, negotiations appear to have transpired in March 2018, just prior to the City's entry as intervenor in the Lehigh County litigation (April 2018). *Id.* ¶ 10.

"<40" from Power"
Midspan Violation

Of the violations included in the first five categories, which can all be described as violations related to NESC requirements governing separation between communications conductors and power facilities at the pole (a total of 451 of the alleged violations), approximately 77% are streetlights, and approximately ½ of those are greater than 20" from streetlights and thus meet the requirements of the applicable 2012 NESC Code, and thus are not violations.[31] As MAW explained in detail in its Complaint, any attachment installed prior to the effective date of the 2017 NESC that is between 20" and 40" from the ungrounded streetlight is "grandfathered" under the standard in existence at time of installation, a position that PPL supports.[32]

In addition, as delineated below, many of the alleged clearance issues involving streetlights were preexisting violations that PPL documented in its 2009 audit of the City's attachments. Moreover, with respect to alleged violations relating to street light drip loops, the NESC-required 12-inch separation may be reduced to 3 inches if the underhanging communication facility is insulated.[33] Finally, any other potential violations regarding

[31] PPL only provided detailed violation information for approximately half of the poles included on its Attachment D, Exhibit 4 (up to line 575). From the more detailed information, MAW calculated 101 poles with communications facilities within 20" of a streetlight, 91 less than 40" but greater than 20" from a streetlight, 36 with communications facilities less than 40" from a drip loop or riser, and 22 with communications facilities less than 40" from secondary power. From these numbers, MAW calculated a total of 250 violations, 192 of which involved streetlights (77%), and 47% of those were greater than 20 inches and thus grandfathered. The second half of PPL's Exhibit 4 lumps all of these types of violations into one category – Less than 40" from Power. There are 201 such alleged violations listed.

[32] *See* Compl. ¶ 50; Answer at 36 (acknowledging that MAW's interpretation of the NESC is "consistent with the testimony of PPL's Kristie Rippke, P.E. in the state court case.").

[33] NESC Rule 238(d).

ungrounded streetlight clearance can easily be remedied by grounding the streetlights. In fact, PPL was supposed to transfer ownership of the streetlights to the City but refuses to do so until they are grounded.[34] MAW has offered to pay to ground all of the streetlights.[35] Under the current NESC, prospectively, utilities are instructed to locate streetlights higher on the pole to outside of the communications worker safety zone to protect communications workers from ungrounded power facilities.[36]

3. PPL's Own Data Indicates That Any "Safety" Issues Caused By MAW Comprise A Small Fraction Of The Overall Unauthorized Plant

PPL's Attachment D, Exhibit 4 lists a total of 539 poles with alleged safety violations. Of those, 356 poles are part of the J-and-raise project of the existing City and LCSC plant. On those poles, MAW attached its facilities using the same through bolts originally installed by the City and LCSC. 144 of those poles were also listed on PPL's 2009 Audit of the City's poles. MAW identified only 23 poles, approximately 2% of the 1,095 poles listed on Exhibit 4 where it may have created the initial violation.[37]

MAW stands ready to remedy these and all of the other safety issues, as many can be easily fixed, but PPL is preventing MAW from doing so under the shield of the April 2018 Order while it continues to remove all of MAW's plant, deeming it "unsafe."[38] To the extent that PPL relies on arguments that it has no obligation to process applications to remedy existing unauthorized attachments or existing NESC violations, MAW responds as follows:

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[34] FW Reply Decl. ¶ 11.
[35] *Id.* ¶ 12.
[36] NESC 2017 Handbook, Figure H238B-2 ("[I]t is not appropriate any longer to have ungrounded luminaires or traffic signals in the communication worker safety zone.").
[37] FW Reply Decl. ¶ 13.
[38] *Id.* ¶ 14.

1. Of the 1,095 poles alleged to include unauthorized attachments listed in Attachment D, Exhibit 4, more than half, 637, are stated as creating no safety violations. Only 539 poles are stated to have exigent safety violations requiring immediate correction.[39]

2. PPL does not dispute that at least 428 authorized attachments were transferred to and MAW has paid annual rental to PPL for 428 attachments.[40]

3. Of the 1,095 poles alleged to include unauthorized attachments listed in Attachment D, Exhibit 4, 268 are located on poles identified in PPL's 2009 audit of the City's attachments, with many having similar if not identical violations. Where MAW performed the J-and-raise, it used the City's or LCSC's existing through bolts. Thus, at least 365 of the alleged violations (67%) were caused by through bolts installed by the City or LCSC, of which PPL has been or should have been aware since 2009 when it audited the City's attachments.[41]

4. Of the 1,095 poles alleged to include unauthorized attachments listed in Attachment D, Exhibit 4, PPL only provides detailed information concerning the nature of the alleged violations for the first 574. For attachments beginning after line 575 of Exhibit 4, the comments in Column N only state that the attachment is located within 40 inches of power, but provides no additional detail about the location of the attachment or the type of power facility (*e.g.*, ungrounded streetlight, streetlight drip loop, secondary drip loop, riser, or other), effectively preventing MAW and the Commission from understanding the true nature of the

[39] *Id.* ¶ 15.
[40] Answer at 10, 27
[41] *Id.* ¶ 16.

alleged violations. Moreover, MAW reimbursed PPL a total of $44,930.18 for a survey of its attachments purporting to address these very issues, yet PPL still fails to provide the necessary detail to assess the alleged violations.[42]

5. Of the 574 poles alleged to include unauthorized attachments for which detailed information is available, using a percentage extrapolated from the more detailed data that is available, 77% of the alleged the 40-inch separation violations involve non-grounded streetlights. Nearly half of those are at least 20 inches from the streetlight brackets and, as PPL's witness agrees, attachments made prior to the effective date of the 2017 NESC (all of MAW's attachments) were grandfathered and are not violations.[43]

6. In addition, of all the alleged violations of the 20" separation requirements from streetlight brackets (roughly 163 in total using the extrapolation), many involve ADSS cable which can be located closer to power facilities.[44]

7. Of the 574 poles alleged to include unauthorized attachments for which detailed information is available, approximately 15 percent are listed as being too close to drip loops. However, these can be easily remedied by covering the loop with a suitable nonmetallic covering that extends at least 50 mm (2") beyond the loop, or bonding MAW's facilities.[45]

[42] *Id.* ¶ 17.
[43] *Id.* ¶ 18; *infra* note 32.
[44] FW Reply Decl. ¶ 19; *accord* Answer at 8 ("PPL admits that ADSS fiber that is non-conductive may be installed closer to electric facilities than can conductive telecommunications cable . . . .").
[45] FW Reply Decl. ¶ 20.

8. Of the 539 poles alleged to have violations, very few would require make-ready work to resolve, and all of remedial work could be performed without drawing the escrow down below $0.[46]

C. PPL's Constantly Changing Application Requirements and Its Insistence that New Attachers Locate Above the Highest Attachment Effectively Deny Access To Its Poles

As explained below, in addition to not acting on MAW's applications in a timely manner, PPL has changed and/or concealed its requirements for both MAW's rebuild and service drop facilities. Moreover, PPL's policy mandating that a prospective attacher take the topmost position on each pole is inefficient and contrary to FCC policy.

1. MAW's Rebuild Applications

PPL admits that it moved the goalposts on MAW's more recent efforts to submit applications for its rebuilt municipal network.[47] To comply with the court's April 2018 Order, MAW resubmitted its rebuild application information on April 25, 2018 using PPL's Form 4834, along with supporting drawings for the J-and-raise rebuild project ("rebuild paperwork").[48] Form 4834 did not specify that pole numbers were required.[49] PPL denied the application because it was submitted after the project was already begun—a fact that, three years after the project had begun, was known to all involved, including the Lehigh County judge, at the time the court issued the April 2018 Order.[50] PPL then, quite euphemistically, "modified and enhanced its process" to require submission through its cumbersome online portal beginning in August

[46] *Id.* ¶ 21.
[47] Answer at 66.
[48] *See* FW Decl. ¶ 58 and Exh. 22 (MAW rebuild application paperwork submitted to PPL (Apr. 25, 2018)).
[49] *Id.* ¶ 22.
[50] *Id.*

2018.[51] By August 2, 2018, MAW resubmitted its rebuild applications using PPL's portal, but Mr. Yanek denied the applications on August 16, 2018 alleging they lacked requisite detail.[52] PPL now claims because the rebuild paperwork was, as of August 2018, required to be submitted through the online portal, pole numbers were required.[53] PPL cannot reasonably claim to have denied an application submitted in April 2018 based on standards PPL did not implement until August 2018, and PPL cannot reasonably expect Mr. Yanek's vague statements provided with his denial to have filled in the detail for MAW—he could have simply stated that pole numbers were required. Judging by prior conduct, for MAW to continue to attempt to bring its rebuilt network into compliance is a fool's errand because PPL will simply continue to change its internal requirements so that it may deny the applications. Moreover, PPL's claims that MAW is unique in its complaints about PPL's portal are unfounded because the same issues were raised in a previous pole attachment complaint filed against PPL by another attacher.[54]

2. MAW's Service Drop Applications

Again, PPL continued to play hide the ball from MAW, maintaining (but not sharing) a secret definition of "service drop." Contrary to PPL's logic leaps, there is no commonly understood definition of what constitutes a "service drop" other than that it is a telecommunications line used to provide service to customers that begins at a point on the backbone network and ends at a customer location.[55] The parties' Pole Attachment Agreement simply defines "Service Drop Attachment" as "[a] separate point of attachment on PPL's poles used to support one or more service cables that extend from Licensee's attachments on PPL's

[51] Answer at 66-67.
[52] FW Reply Decl. ¶ 23.
[53] Answer at 68.
[54] *See Zito Canton Complaint*.
[55] FW Reply Decl. ¶ 24.

poles to a point of service on a customer's premises."[56] PPL's attempts to characterize its more constrained definition as a logical outgrowth of the generic definitions in the Agreement, the NESC, and a single Bureau-level FCC case are not persuasive.[57]

PPL never afforded MAW the opportunity specified under an unpublished policy to submit a corrective application when PPL determined that MAW's service drops not meet PPL's definition.[58] PPL's "ATBS Policy Governing the Use of Service Drops as a Method of Attachment"[59] (the "Unpublished Service Drop Policy") recognizes that PPL "***has no clear description defining service drops*** which do not fall under 6-01-140 [PPL's general attachment standards]."[60] In recognition of PPL's own lack of clarity on service drops, the Unpublished Service Drop Policy provides a cure should a dispute arise, but never offered such opportunity to MAW.[61] Section 5.3 of the Unpublished Service Drop Policy states that if after installation, PPL determines that the attachment does not meet PPL's "expectation of a service drop," it may ask the attaching company to submit an application within 60 days.[62] While the policy does not list an effective date, it appears to have been created on September 5, 2011.[63] Yet PPL concedes it did not inform MAW of this policy until "the Summer [sic] of 2018."[64] Though PPL disputed

[56] PA Section 1.18, MAW000176.
[57] Answer at 44-45.
[58] FW Reply Decl. ¶ 25.
[59] PPL Answer at Attachment D, Exhibit 18.
[60] PPL000208 (emphasis added). The definition provided in the Unpublished Service Drop Policy is similarly vague, defining a "Service Drip" [sic] as "[a]ny low tension attachment traversing a short distance to serve a customer not governed under specifications for bolted attachments, but subject to all NESC guidelines." *Id.*
[61] FW Reply Decl. ¶ 25.
[62] PPL000208.
[63] PPL000210.
[64] Answer at 49. In the alternative, while PPL treats the policy as though it is still in effect, it is possible the policy expired prior to MAW's attachments; it states it is only effective for 5 years after its effective date and was produced in September 2011. PPL000210.

MAW's characterization of certain of its plant as service drops, PPL never allowed MAW the opportunity to submit a curative application under Section 5.3 after PPL unilaterally determined it did not meet PPL's own unpublished definition, which would have aided in resolution of the parties' dispute.[65]

MAW was operating under the belief that other network operators were using an expansive definition of service drop in PPL's service territory. Despite taking Mr. Wiczkowski's testimony out of context—he was explaining how open-ended the contract's definition was—MAW's longest service drop was approximately 3,000 feet long and extended from the backbone network to a health care facility. PPL removed this service drop in 2018.[66]

PPL also falsely claims that MAW "never submitted any applications at all for what it illicitly defined as 'service drops.'"[67] First, the FCC has ruled that a pole owner may not require prior approval for service drops,[68] and under the express terms of the parties' Pole Attachment Agreement, service drops do not require application and prior approval.[69] Nevertheless, by April 30, 2018 and in compliance with the April 2018 Order, MAW did in fact submit 103 applications for its service drops, notwithstanding the parties' dispute concerning the definition of service drop in the parties' Pole Attachment Agreement.[70]

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[65] If PPL contends the unpublished policy is in effect, PPL should have made it known to MAW at the appropriate time and should have allowed MAW to submit the curative application within the 60-day timeframe. In the alternative, if the intended effective date indeed September 2011, then by its own terms, the policy would have expired within five years, long prior to MAW affixing service drops to PPL poles.
[66] FW Reply Decl. ¶ 26.
[67] Answer at 48-49.
[68] *See Salsgiver Commc'ns, Inc. v. N. Pittsburgh Tel. Co.*, 22 FCC Rcd. 20536, 20543-44 ¶¶ 24-25 (Enf. Bur. 2007) (invalidating a provision requiring 30-day advance notice prior to attaching or removing a service drop attachment).
[69] *See* PA Section 6.4, MAW000183.
[70] *See* Lloyd Decl. ¶ 12.

Contrary to PPL's allegations, MAW did not use service drops to expand its network into the footprint that it abandoned upon receiving the extremely high make-ready quotations in 2016. MAW never constructed any of this "new build" network after receiving the make-ready quotes. Instead, MAW used service drops to serve customers in areas where MAW had existing backbone network from its J-and-raise rebuild project.

3. The FCC Should Order PPL To Revise Its Topmost Pole Position Policy For Prospective Attachers To Promote Cost-Effective Deployment

PPL refuses to reconsider its position that new attaching entities must attach above the highest existing attachment even where other space exists on the pole,[71] resulting in extraordinarily high, unnecessary make-ready costs. If the FCC allows PPL's position on this issue to stand, it will undermine the objectives of the Commission's new OTMR rules.[72] Attaching directly above or below the lowest attacher on the pole—typically the ILEC—will often present the easiest, least costly, most achievable deployment solution.[73] As the Commission and PPL are aware, many ILECs are abandoning their heavy, obsolete plant in place on the pole. Even assuming, *arguendo*, the ILEC must maintain the lowest position on the pole, cost savings can still be realized wherein a new prospective attacher could simply move the ILEC into lowest position.[74] This is permissible under the FCC's OTMR regime and reduces

[71] Answer at 20.
[72] *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7706 (rel. Aug. 3, 2018) ("OTMR speeds and reduces the cost of broadband deployment by allowing the party with the strongest incentive—the new attacher—to prepare the pole quickly by performing all of the work itself, rather than spreading the work across multiple parties. By some estimates, OTMR alone could result in approximately 8.3 million incremental premises passed with fiber and about $12.6 billion in incremental fiber capital expenditures.").
[73] FW Reply Decl. ¶ 27.
[74] *Id.*

necessary make ready as compared to moving all other attachers on the pole.[75] MAW offered such an attachment strategy but was denied by PPL.[76] Consequently, the Commission should ensure that MAW is allowed to implement cost-effective attachment strategies by either permitting MAW to attach in the lowest position on the pole, assuming space is available, or, at minimum, permitting MAW to move the ILEC into the lowest position rather than moving every attacher on the pole.

III. MAW DISPUTES PPL'S CHARACTERIZATION OF MAW AS A BAD ACTOR

In its Answer, PPL lodges several serious allegations against MAW's conduct in an attempt to smear the company's reputation and credibility before the Commission. Because many of PPL's allegations are wholly irrelevant to PPL's ongoing denial of access that is the subject of this complaint, MAW will limit its responses below to only PPL's most serious allegations.

In its quest to distract from its ongoing denial of access, PPL relies heavily on the testimony of a supposed "whistleblower," Mr. Joseph Staboleski, who PPL claims left MAW because he was "hounded" by his conscience.[77] If Mr. Staboleski had regrets, it is possible those regrets were over his own serious malfeasance while on MAW's payroll that ultimately led to his resignation. As was revealed during the same testimony upon which PPL relies, Mr. Staboleski is in fact a disgruntled former employee who resigned in disgrace after MAW became aware of several repeated incidents of misconduct.[78] In testimony before the Lehigh County Court, Mr. Staboleski admitted that he misused the company credit card on at least two separate occasions;

[75] *Id.*
[76] *Id.*
[77] *See, e.g.*, Answer at 6.
[78] FW Reply Decl. ¶ 28 and Exh. 5 (Excerpt of testimony of Joseph Staboleski, (Mar. 23, 2018) at 31:21-34:15).

repeating his misconduct after receiving a warning.[79] Mr. Staboleski also admitted that he placed a tracker on a vehicle belonging to one of his female co-workers at MAW for no legitimate purpose.[80] After MAW leadership uncovered this significant misconduct, Mr. Staboleski submitted his resignation and Mr. Wiczkowski accepted.[81] Two weeks prior to his resignation, Mr. Staboleski contacted PPL regarding what he saw as safety violations.[82] Afterward, he threatened to blackmail MAW by contacting PPL—despite having done so already—if MAW did not reinstate his job, but MAW refused to do so.[83] As a result, his statements about MAW are not credible.

Relatedly, after MAW was unable to reach Mr. Klokis despite multiple attempts, Mr. Wiczkowski instructed Mr. Staboleski to draft and send a letter informing PPL that it had J-and-raised the municipal network and noting that its engineering documents were available to be submitted to PPL.[84] In a bold, sweeping assertion, PPL alleges that the January 15, 2016 letter was "fraudulent."[85] While the letter was not fraudulent, MAW cannot confirm whether Mr. Staboleski ever actually transmitted it to PPL.[86] Upon Mr. Wiczkowski's instruction, the January 2016 letter was created by Mr. Staboleski, a fact that is confirmed by the metadata on the original Word file as well as Mr. Staboleski's corresponding time entry.[87] Mr. Wiczkowski also instructed Mr. Staboleski to send the letter to PPL and he may well have done so using

[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* ¶ 29.
[85] Answer at 11-12.
[86] FW Reply Decl. ¶ 29.
[87] *See* FW Reply Decl. ¶ 29 and Exh. 6 (Word metadata); Exh. 7 (Staboleski January 2016 timesheet).

PPL's pole attachment webpage instructions,[88] but MAW cannot confirm whether it was sent or uploaded.[89] At the time Mr. Staboleski authored the letter, MAW principals had no reason to believe he would not carry out his normal duties.[90] PPL is well aware of Mr. Staboleski's credibility issues based on his testimony in the Lehigh County Court. PPL does not deny that it failed to notify attaching entities of its change in pole attachment management personnel, or that employees other than Mr. Klokis knew of MAW's proposed J-and-raise rebuild.[91] Yet it offers no excuse for why no one at PPL got back to MAW if in fact applications were so clearly required.[92]

In PPL's attempt to discredit MAW, PPL fails to mention the companies' prior business relationship. PPL hired MAW in 2003 to design their over 20-route-mile Reading, PA Metro Fiber Ring Network.[93] In addition to the parties' Pole Attachment Agreement, PPL also entered into a 20-year indefeasible right of use ("IRU") agreement with MAW in 2003 that is still in existence today.[94] PPL also neglects to mention that, should MAW go bankrupt, PPL stands to benefit, as MAW owns nine miles constituting approximately one third of the Reading Metro Ring and several additional lateral extensions that are key to the Reading Metro Ring Network's profitability.[95] In addition, PPL and MAW have a second IRU agreement that grants MAW no cost access to the other two thirds of PPL's Reading Metro Ring that MAW did not construct.[96]

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[88] Around January 2016, MAW believes that the relevant section of the PPL website on pole attachments contained a generic email address to which the letter was to be sent.
[89] FW Reply Decl. ¶ 29.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.* ¶ 30.
[94] *Id.*
[95] *Id.*
[96] *Id.*

Finally, while PPL claims it is "willing to consider any remediation plan" that is part of a "holistic approach," it has outright refused to engage in a meaningful discussion with MAW to address its proposed remediation.[97] MAW has made numerous settlement offers to PPL that have been rejected.[98] As recently as February 2019, PPL flat-out refused to engage with MAW until MAW replenished the escrow fund related to the Lehigh County order, which MAW has every reason to believe PPL will then use to further dismantle MAW's network under the guise of its holistic approach.[99] MAW has shown its willingness to come to the table and make concessions to negotiate in the spirit of good faith negotiations, but PPL steadfastly refuses.[100] PPL continues to wield its outsized influence over MAW, failing to satisfy its obligations under the April 2018 Order to take action on MAW applications while simultaneously using the Order to remove more and more MAW plant.[101]

[97] Answer at 77.
[98] FW Reply Decl. ¶ 31.
[99] *Id.*
[100] *Id.*
[101] *Id.*

IV. CONCLUSION

PPL admits that it has denied MAW access to its poles and has not adequately justified such denial with a requisite showing under Section 224(f)(2). Accordingly, pursuant to Section 1.1410 of the Commission's rules, MAW respectfully requests an order from the Commission mandating that PPL timely process MAW's applications, and grant such other relief requested by MAW in its Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2019, I caused a copy of the foregoing Reply and exhibits and declarations in support thereof, to be served on the following (service method indicated):

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